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IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

No. 991

E. E. FORBES, ET AL.,

Petitioners,

v.

CITY OF HOUSTON, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, entered in the above entitled case on July 11, 1957.

OPINION BELOW

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas is reported at 304 S.W. 2d 542. (Appendix A, pp. 1-11.) No opinion was rendered by the Supreme Court of Texas.

JURISDICTION

The judgment of the Court of Civil Appeals was pronounced on July 11, 1957, and Motion for Rehearing was denied on August 12, 1957. On October 30, 1957 the Supreme Court of Texas denied Petitioners' Application for Writ of

Error to the Court of Civil Appeals with the notation "Refused. No Reversible Error.", and on February 12, 1958, denied a Motion for Rehearing on the Application for Writ of Error. The Application and each Motion were timely filed. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257 (3).

The Supreme Court of Texas having denied Application for Writ of Error with the docket notation "Refused. No Reversible Error.", certiorari is properly directed to the Court of Civil Appeals as "the highest court of a State in which a decision could be had". 28 U.S.C.A. §1257 (3); *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U.S. 157, 159, 160, 74 S. Ct. 396 (1954); *Adam* v. *Saenger*, 303 U.S. 59, 61, 58 S. Ct. 454 (1938). Judgment was not final until the Order entered on February 12, 1958 denying the Motion for Rehearing on the Application for Writ of Error.

QUESTIONS PRESENTED

The State Court held that Petitioners (affected property owners), without joinder of a State's attorney on an information in the nature of *quo warranto*, did not have access to the state courts to attack an ordinance of the City of Houston annexing 187 square miles to the limits of the City as being void for reasons not apparent on its face. These questions are thus presented:

I.

Whether the Due Process Clause and the Equal Protection Clause were violated by State Court in denying Petitioners access to the state courts to attack the ordinance because they could not obtain the consent of a State's attorney on a *quo warranto* proceeding, when:

(A) by statute such proceeding cannot be filed without consent of a State's attorney and he cannot be com-

pelled to give his consent even though a public injury is involved;

(B) under the common law of the State the State's attorney, without governing rule or standard, may consent to file such proceeding to protect a private right of a favored person even though the State has no interest in the matter, and may refuse such consent to another under like circumstances; and

(C) by practice and custom the consent of a State's attorney to such proceeding is a formality, the State being a nominal party and the litigation being conducted by the private relator.

II.

Whether the Due Process Clause and the Equal Protection Clause were violated by the refusal of the State Court to grant Petitioners access to the courts to complain that the ordinance is void for reasons not apparent on its face unless consent of a State's attorney was obtained, when under the common law of the State:

(A) an ordinance of the City of Houston is void if not adopted in compliance with controlling statutory and charter provisions, whether or not the invalidating defect is apparent on the face of the ordinance; and

(B) persons similarly situated to Petitioners, without any reasonable basis for different classification and without consent of a State's attorney, may have access to the courts to attack a similar ordinance if it happens to be void on its face.

CONSTITUTIONAL PROVISIONS, STATUTES, CHARTER PROVISIONS, AND ORDINANCES INVOLVED

(1) The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(2) The statutes, charter provisions and ordinances involved are set out in Appendix B, pp. 13-16.

STATEMENT OF THE CASE

I. Annexation Procedure of Home Rule Cities in Texas.

In 1912 Section 5, Article XI, of the Constitution of Texas was amended to provide that cities having more than 5,000 inhabitants

> "may by a majority vote of the qualified voters . . . adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with . . . general laws enacted by the legislature . . . "

At its next session, in 1913, the Legislature adopted the forerunner to the present Art. 1175, Tex. Civ. Stat. (Vernon 1948), which enumerates limitations on powers of home rule cities. The constitutional amendment is the source of power, not to the statute. *Dallas County Water Control and Improvement District* v. *City of Dallas*, 149 Tex. 362, 233 S.W. 2d 291 (1950).

The power of annexation of such cities is limited by Subdivision 2., Art. 1175, providing that such cities shall have the power to annex "additional territory lying adjacent to said city, according to such rules as may be provided by said charter".

Pursuant to the constitutional grant and subject to the statutory limitations, according to an authoritative report[1] of a few years ago, sixty-five cities of Texas have adopted charter provisions permitting annexation of additional ter-

[1] Staff Research Report to the Texas Legislative Council, Municipal Annexation, pg. 24, 25 (1954).

ritory by ordinance without the consent of the residents of the territory annexed.

Among these cities is the City of Houston in which the voters in 1913 adopted Section 2b., Art. 1 of the Charter authorizing the City Council by ordinance to annex "additional territory lying adjacent to said City with or without the consent of the territory and inhabitants annexed" in accordance with the procedure prescribed (Appendix B, p. 14). An additional limitation on this power was imposed by the adoption in 1942 of Section 3., Art. VII of the Charter providing for public meetings of the Council and its committees (Appendix B, pp. 14, 15).

II. The Facts Material to The Questions Presented

On February 1, 1956, Councilmen Kesseler, McLemore and Marquette were appointed to the Ordinance Committee of the Council of the City of Houston (T.R. 203).[2] At approximately 8:30 o'clock A.M., on October 31, 1956, in the private dining room of the Mayor, with no member of the public or the City Secretary present and with no previous notice to the public or the Council, the Mayor presented a proposed annexation ordinance to various members of the Council, including members of the Ordinance Committee (M.C. 9-12).[3] Attached to the proposed ordinance was a letter of transmittal from the mayor on which there was a statement for the signatures of the Ordinance Committee stating that the ordinance was reported favorably and recommended for passage. This statement was signed by members of the Committee before the Council convened for its

[2] "T.R." is used to designate the printed transcript of the trial court proceedings.

[3] "M.C." is used to designate the deposition of councilman Lee McLemore ordered transmitted directly to this Court by the court below.

regular meeting at 10:30 o'clock A.M., that day (T.R. 80, 81). At the regular meeting the proposed ordinance was introduced, given the number 3351 and passed on first reading (T.R. 91, 92). (Appendix B, pp. 15, 16.) The Ordinance Committee failed to hold any meeting. Nor did the Committee file a report to the Council on Ordinance No. 3351 after its introduction.

On November 21, 1956, Ordinance No. 3351 was amended and passed on second reading (T.R. 102-109), and on November 23, 1956 the Ordinance, as amended, was published in a daily newspaper (T.R. 72). At the next regular meeting, on November 28, the ordinance was amended again and passed on third reading (T.R. 112-117), and on November 29, the ordinance, as amended, was published again in a daily newspaper. Neither publication was authorized or ordered by the Council. The Council took no action declaring that it had amended Ordinance No. 3351 as desired for final passage until it adopted a motion on December 26, adjourning the meeting until December 31, 1956, "for the purpose of then considering, for its final passage, Ordinance No. 3351" (T.R. 117). Ordinance No. 3351 was not published after adoption of this motion.

At the meeting on December 31 the Council finally passed Ordinance No. 3351, which purported to annex approximately 187 square miles to the City of Houston. At this meeting the Council arbitrarily denied citizens the charter right to be heard on the ordinance (T.R. 63, 74-78, 156, 157, 177-179).

On December 28, 1956, Petitioners filed this suit against the City of Houston and its Controller, stating two causes of action. The first (in behalf of Petitioners who are property owners in the area annexed, individually and as a class) sought a declaration that the ordinance was void and an injunction preventing assessment and collection of ad

valorem taxes on their property. The second (in behalf of five taxpaying citizens of the City) sought to enjoin payment by the City of the $35,000,000 bonded indebtedness of various water districts in the area annexed.

Petitioners' suit asserted that the ordinance was void for various defects not apparent on the face of the ordinance and for various other defects visible on its face. Under the first group, Petitioners alleged that the Ordinance Committee of the Council did not hold a public meeting or report on the ordinance to the Council after its introduction; that the Council did not amend the ordinance as desired by it for final passage before final publication in a daily newspaper; that the ordinance was not published in a daily newspaper one time after the Council had amended it as desired for final passage; and that the Council arbitrarily denied Petitioners and other citizens the opportunity to be heard at the meeting at which the ordinance was finally passed. In the second group, Petitioners alleged that the ordinance was void because its title was defective, it amended a referendum ordinance without a vote of the electorate, the charter provision authorizing annexation had been repealed, and that the description of the area annexed was defective (T.R. 1-26).

By exceptions and special pleas Respondents urged that Petitioners could not maintain the suit as to the first group of points without obtaining consent of a State's attorney on an information in the nature of *quo warranto* and that Petitioners could only attack the ordinance as being "void on its face" (T.R. 29-34).

In Texas the proceeding termed an "information in the nature of *quo warranto*" may only be brought by the Attorney General of Texas or the District Attorney or County Attorney of the appropriate county. Tex. Civ. Stat. (Vernon 1948), Art. 6253. (Appendix B, pp. 13, 14.) The juris-

diction of the District Attorney of Harris County is limited to criminal cases. Tex. Civ. Stat. (Vernon 1954 Supp.) Art. 326k-26. On January 1, 1957, and at all times subsequent material to this cause, the County Attorney of Harris County was Joe Resweber. From January 1, 1956 until 12:00 P. M. December 31, 1956 Mr. Resweber was a member of the Council of the City of Houston. While a member of the Council Mr. Resweber attended the meetings at which Ordinance No. 3351 was introduced, amended and passed on various readings and voted for the passage of the ordinance on each reading. On January 16, 1957, Mr. Resweber, as County Attorney advised the County Judge of Harris County in a written opinion that the judge did not have authority to call elections in response to three petitions presented to him for incorporation of areas within the territory described in Ordinance No. 3351, the opinion assuming that the ordinance was valid (T.R. 163-169).

In view of this opinion, Petitioners concluded that Mr. Resweber would undertake to represent the County Judge in a suit styled E. E. Forbes v. Bob Casey, No. 480,270, in the District Court of Harris County, a suit seeking a writ of mandamus to compel the County Judge to call an election on the question of incorporating the Village of Mykawa lying within the territory described by Ordinance No. 3351. This conclusion was verified on February 11, 1957 when Mr. Resweber filed an Original Answer in behalf of Judge Casey in said suit (T.R. 163,164). Under these facts the County Attorney was morally and legally disqualified to bring *quo warranto* on relation of these Petitioners.

Petitioners requested the Attorney General of Texas, the Honorable Will Wilson, to file a *quo warranto* proceeding questioning the validity of Ordinance No. 3351, urging that such proceeding should be brought to eliminate the technical procedural defenses asserted by Respondents and to allow

the substantive issues to be determined on the merits. This request was vigorously resisted by attorneys for Respondents. At the time of the hearing in the trial court the Attorney General had not consented to bring the proceeding and has not brought such a proceeding (T.R. 164-166).

The trial court granted Respondents a summary judgment without assigning reasons therefor (T.R. 218, 219). The Court of Civil Appeals considered and overruled Petitioners' points which asserted that the ordinance was void on its face, but refused to consider the points which urged that the ordinance was void for reasons not apparent on its face. See opinion Appendix A, pp. 1-12.

The Supreme Court of Texas denied Petitioners' Application for Writ of Error with the docket notation "Refused. No Reversible Error." and overruled a motion for rehearing on the Application (S.R. 1).[4]

II. Federal Questions Raised in Courts Below.

(A). Trial Court: While denial of equal protection of the laws and due process to Petitioners did not occur until the entry of judgment by the Court of Civil Appeals denying their right to maintain this suit, prior to entry of the judgment by the pleadings (T.R. 5), argument to the trial court, and "Plaintiffs' Motion Concerning Form of Judgment Entered" (T.R. 215-217), Petitioners urged that these constitutional rights would be denied if they were refused the right to maintain this suit.

(B). Court of Civil Appeals: Under the rules governing appeals to the Court of Civil Appeals, the appealing party is required to file a brief containing a statement of points upon which the appeal is predicated. Tex. Rules Civ.

[4] "S.R." designates transcript of Supreme Court of Texas proceedings.

Proc., Rule 418. Point 13 in the "Brief for Appellant" (Petitioners) urged that the judicial rule that the ordinance could be attacked only by an information in the nature of *quo warranto* and that Petitioners had no right to seek judicial relief except by petition to a State's attorney of Texas denied Petitioners due process under the United States Constitution (C.R. 8).[5] The opinion of the Court of Civil Appeals does not mention this point, but it was overruled by the court affirming the judgment of the Trial Court (Appendix A, pp. 12, 13).

The rules governing proceedings subsequent to the opinion of the Court of Civil Appeals provide for the filing of a motion for rehearing in which the assignments of error relied upon for the rehearing shall be distinctly specified. Tex. Rules Civ. Proc., Rule 458. Point 4 in Appellants' Motion for Rehearing urged that the refusal of the Court of Civil Appeals to consider and rule on the points in the "Brief for Appellants" urging infirmities of the ordinance not apparent on its face constituted a denial of equal protection of the laws and due process under the Constitution of the United States (C.R. 183). This point was buttressed by argument in the motion for rehearing and by supplemental argument. This point was overruled by the order of the Court of Civil Appeals denying the rehearing (C.R. 180).

(C). Supreme Court of Texas: The rules governing applications for writ of error require a statement of the points of error relied upon. Tex. Rules of Civ. Proc., Rule 469. Point 4 in Petitioners' Application for Writ of Error stated that the Court of Civil Appeals erred in refusing to consider and rule on Petitioners' points of error in the brief in the Court of Civil Appeals asserting the ordinance was

[5] "C.R." designates transcript of Court of Civil Appeals proceedings.

void for infirmities not apparent on its face and that such refusal constituted a denial of equal protection of the law and due process guaranteed by the Fourteenth Amendment of the Constitution of the United States (A. 6).[6] The Supreme Court overruled this point by denial of the Application with the docket notation "Refused, No Reversible Error" (S.R. 1). This notation means that the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the Application presents no error which requires reversal and approves the judgment of the Court of Civil Appeals. Tex Rules Civ. Proc., Rule 483; *Johnson* v. *Zurich General Accident & Liability Ins. Co.*, 146 Tex. 232, 205 S.W. 2d 353 (1947); Calvert, *The Application for Writ of Error*, 3 Franki Tex. Rules of Civ. Proc. 404, 411; Simpson and Wall, *Problems of Precedent Affecting Courts of Civil Appeals' Opinions*, 4 S.W. L.J. 398, 403.

A motion for rehearing on the refusal of an application for writ of error is required to be filed within fifteen days and to distinctly specify the grounds relied upon for the rehearing. Tex Rules Civ. Proc., Rule 515. Ground 1 of Petitioners' Motion for Rehearing of application for writ of error urged again that the refusal of the Court of Civil Appeals to consider and rule on the points in Petitioners' brief asserting invalidity of the ordinance for reasons not apparent on its face constituted a denial of equal protection of the law and due process guaranteed by the Fourteenth Amendment of the Constitution of the United States (M. 4).[6] The order overruling the motion for rehearing overruled this ground of error (S.R. 1).

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[6] "A" designates certified copy of Application for Writ of Error filed with transcripts. "M" designates certified copy of Motion for Rehearing filed with transcripts.

(D). Summary: While Petitioners anticipated and attempted to forewarn the courts that a refusal of access to the courts to attack Ordinance No. 3351 would constitute a denial of rights under the Constitution of the United States, the denial of equal protection of the laws and due process did not occur until the entry of judgment by the Court of Civil Appeals. The trial court rendered no opinion and the only finding in its judgment is that there was no genuine issue as to any material fact, and the decree following simply granted the Respondents motion for summary judgment (T.R. 218, 219). This judgment did not determine that Petitioners did not have access to the court. The applicable rules require that a ruling complained of originating in the Court of Civil Appeals must be assigned as error in the motion for rehearing in that court. Tex. Rules Civ. Proc., Rule 469. This Petitioners did (C.R. 183). Petitioners assigned such ruling as error in their Application for Writ of Error and the Motion thereon, both of which were overruled. Under this record the Federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

ARGUMENT

I. Importance of Questions.

Questions involving violation of the Fourteenth Amendment by a state's denial to a citizen of access to its court and by the state granting a judicial remedy to one man and denying it to another under like circumstances have rarely come before this Court, and the precise questions here have not been heretofore determined by this Court. Stated abstractly, the questions here are:

> (1) Whether due process and equal protection of the laws are denied a citizen by a state subjecting his

right to seek judicial relief against a void ordinance to the unrestrained discretion of a State's attorney, and

(2) Whether, when there is no basis of distinction and no reasonable relation to a legitimate object, a state denies due process and equal protection of the law when it grants judicial relief to a citizen annexed by an ordinance void on its face and denies it to another under like circumstances and in the same territorial jurisdiction annexed by void ordinance whose invalidities do not appear on its face, unless he can obtain consent of a State's attorney.

These two questions are not unlike those presented in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886) and *Truax* v. *Corrigan*, 257 U.S. 312, 42 S. Ct. 124 (1921), respectively. *Yick Wo* holds that a person's rights cannot be subjected to an arbitrary power to give or withhold consent to their exercise and that if a law fair on its face is administered by public authority with an unequal hand "so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights", the Fourteenth Amendment is violated. Similarly, *Truax* holds that the amendment is violated by the state granting a judicial remedy to one man and denying it to another under like circumstances in the same territorial jurisdiction.

The occasions for this Court to affirm these basic principles, exemplified by the maxims, "all men are equal before the law," and "this is a government of laws and not of men," have been too few and too long ago to prevent encroachments today. Their affirmation today will insure against unlawful restraints on access to courts tomorrow.

II. The Texas Proceeding of Quo Warranto a Remedy to Protect Private Rights

Application of the basic principles stated above to the instant case requires review of the proceeding in Texas

termed an "information in the nature of *quo warranto*". This proceeding is prescribed by statute. Tex. Civ. Stat. (Vernon 1940) Art. 6253.[7] (Appendix B, p. 13.) Generally, the statute prescribed a procedure by which the state may forfeit a franchise and provides that

> "the Attorney General, or district or county attorney of the proper county or district, either of his own accord or at the instance of any individual relator, may present a petition to the district court of the proper county, or any judge thereof in vacation for leave to file an information in the nature of a quo warranto in the name of the State of Texas."

The statute was enacted in 1879. Tex. Acts, 16th Leg., S.S., 1879 p. 43.

Both before and after adoption of the statute *the proceeding was recognized as one to be filed only when a public injury was involved. Banton* v. *Wilson*, 4 Tex. 400 (1849); *Brennan* v. *City of Weatherford*, 53 Tex. 330 (1880). It has long been recognized in Texas, however, that Art. 6253 has been used *practically* to protect *private* rights and not public rights. In 1885 the Supreme Court of Texas observed that though the action was "brought in the name of the State it is usually upon the relation of the real party plaintiff". *State ex rel Jennett* v. *Owens*, 63 Tex. 261 (1885). At its next term the Texas Supreme Court noted the practice that the relator in a *quo warranto* proceeding was "the real plaintiff" and that the state was "a nominal party", and "in fact, the state, in these contests between private parties over the title to an office, is, in reality, more like an impartial observer than a partisan of either claimant" and that "practically, the State's attorneys take no part in the proceeding,

[7] The court below did not mention Article 6253, but is the basic provision on *quo warranto* proceedings.

and the plaintiff's side of the case is represented by the relator's counsel alone." *McAllen* v. *Rhodes*, 65 Tex. 348 (1886).

These judicial recognitions of the practical administration of the *quo warranto* statute are supported by the actual practices evidenced by reported cases. The State's attorneys may bring the action on their "own accord or at the instance of any individual relator". Examination of the reported cases, however, have failed to reveal any instances in the past 50 years when *quo warranto* proceedings have been brought except on the relation of individual relators.

The practical administration of Art. 6253 is illustrated by *State ex rel Bennett* v. *Clarendon Independent School District*, ... Tex. ..... 298 S.W. 2d 111 (1957). This was a *quo warranto* action to test the validity of a consolidation of school districts. The Court of Civil Appeals affirmed the judgment of the trial court dismissing the action on the ground that the State was not "validly a party". The county attorney signed the pleadings, but did not participate in the trial, the trial being conducted by private counsel for relators. At a hearing after trial the county attorney testified that he signed the information and participated to the extent he did "not because he considered that the state had any interest in the suit, but simply because he thought the individual relators were entitled to 'have their day in court'". Referring to this testimony the Supreme Court held,

> "We take this to mean, so far as the county attorney was concerned, the participation of the State was purely for the convenience of the individual relators, although his conclusions thus to assist them was obviously one reached in the good faith exercise of his official judgment".

Despite this testimony and interpretation the Supreme Court reversed the lower decision holding:

> "It is felt that the admitted absence of a motive on the part of the State to seek relief on its own account, as well as the lack of the personal participation on the part of the State's attorney in the trial, are immaterial, the suit having been filed under the signature of the county attorney and prosecuted with his full consent."
>
> * * *
>
> "It is believed that the same discretionary authority . . . operates also to free him from court control either as to his object in prosecuting the suit or the manner in which he chooses to prosecute it. The extent to which such a rule would apply in case of bad faith on his part is a matter not before us, it being conceded that the county attorney acted in good faith throughout. His admittedly sole motive of giving the private relators 'their day in court', as distinguished from seeking for the State relief in which he deemed it to have an interest, was thus not ground for dismissal of the suit. Still less ground was his failure to participate personally in the trial, when he undoubtedly wanted the case to be tried and had authorized counsel for the private relators to conduct the trial."

While the court speaks of good faith exercise of an official judgment, at the same time it recognizes that the bringing of the action for the sole motive of giving a private relator his "day in court" when the State's attorney did not consider the State had an interest in the suit, was not a bad faith exercise of his judgment. As said in *Yick Wo*, this is not recognition of discretion in the legal sense of the term.

Although initiation of the action is within the unbridled discretion of the State's attorney he "cannot be compelled to do so against his will by mandamus brought by interested

private parties." *State ex rel Bennett* v. *Clarendon Independent School District*, ... Tex. ....., 298 S.W. 2d 111 (1947); *McAllen* v. *Rhodes*, 65 Tex. 348 (1886). The statute, Texas Civil Statutes, (Vernon's 1948) Art. 6253 requires a petition for a *quo warranto* proceeding to be presented to the court "for leave to file". This does not vest arbitrary discretion in the court, it vests a sound judicial discretion subject to appellate review and the discretion is abused if leave to file is refused on a petition stating a cause of action. *State ex rel Manchac* v. *City of Orange*, 274 S.W. 2d 886 (Tex. Civ. App., 1955 err. ref. n.r.e.). This recognition of judicial discretion emphasizes that the discretion vested in the State's attorneys is not judicial.

III. Conclusions on the First Question Presented.

These conclusions are inescapable. Although on its face the statute authorizes a proceeding to protect a public right, the bringing of which rests in the sound discretion of a State's attorney, under the practical administration of the statute and the common law of the State of Texas it provides a remedy to protect private rights even when no interest of the State is involved and vests in the State's attorneys, who cannot be compelled to bring the action, unbridled and unrestrained authority to grant or withhold the remedy in accordance with their personal desires. Thus, property owners in areas annexed by ordinances of home rule cities are divided into two classes by an arbitrary line, on one side of which are those who are permitted to pursue judicial remedies by the mere will and consent of the State's attorneys, and on the other those from whom that consent is withheld at their mere pleasure and will. This is not equal protection of the laws. *Yick Wo* v. *Hopkins*,

118 U.S 356, 6 S. Ct. 1064 (1886). In principle, this is condemned also by authorities invalidating municipal ordinances and municipal action not providing standards or guides for administrative action. *Staub* v. *City of Baxley*, 78 S. Ct. 277 (1958) and cases cited at pages 282-284.

IV. Lack of Basis for Distinction in Remedies Made By Court Below.

Perhaps the Fourteenth Amendment does not require the State to provide a judicial remedy to a citizen annexed by a void ordinance (and it is not argued to the contrary here), but it does require that if the remedy is granted to one person it shall not be withheld from other persons similarly situated. *Truax* v. *Corrigan*, 257 U.S. 312, 42 S. Ct. 124 (1921). An Arizona statute, which prohibited the granting of an injunction against acts by striking employees which acts would be enjoined under a general injunction statute if committed by anyone other than an employee, was held to deny equal protection of the law to the employer. The distinction drawn by the state court between the right to attack an ordinance void on its face and the right to attack one void but the infirmity appears elsewhere is equally bad. There is no basis for the distinction. The public interest[*]

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[*] It is held that the public interest requires *quo warranto* by the State. Much harm could result from "permitting individual citizens from year to year to collaterally attack the validity of a city government." *Tod* v. *City of Houston*, 276 S.W. 419 (Tex. Com. App. 1925); "public policy demands that the validity of territorial extensions . . . not be subject to attack by private citizens" because the judgment in each case would only bind parties thereto. *Kuhn* v. *City of Yoakum*, 6 S.W. 2d 91 (Tex. Com. App. 1928). The validity of this reasoning is questionable. A class action is binding on all members of the class, Tex. Rules Civ. Proc., Rule 42, and a taxpayer's suit is binding on all matters which could have been urged. *Cochran County* v. *Boyd*, 26 S.W. 2d 364 (Tex. Civ. App. 1930, error ref.) The instant suit is a class action and a taxpayer's suit.

is involved in either case, and the condition that the consent of the State's attorney must be acquired in the latter instance and not in the former has no reasonable relation to the legitimate object of having the State protect public rights, rather than protection by multiple suits of citizens.

The distinction in remedies is not based on any difference in the method by which Texas Courts consider the validity of an ordinance. Whether the infirmity appears on the face or not, the ordinance is held void if it fails to comply with controlling constitutional, statutory and charter provisions. Sec. 5, Art. XI, Tex. Const. (Vernon's 1948), provides that any ordinance or charter provision inconsistent with a general law is void. Art. 1175, Tex. Civ. Stat. (Vernon 1948), prescribes that the power of annexation by ordinance must be exercised "according to such rules as may be provided by said charter". Sec. 2b, Art. 1, Charter of the City of Houston and annexation provisions of numerous other Texas cities, prescribe rules to be followed in adopting annexation ordinances. An ordinance not adopted in accordance with these rules violates not only the charter provision but the statute and the constitutional proscription of an ordinance inconsistent with a general law. No distinction between the lack of compliance being apparent or not is made by the constitution, statute or charters, or the courts.

Whether an ordinance annexes territory or ordains on other subjects the courts of Texas have held repeatedly that every step prescribed by statute or charter in the passage of an ordinance must be taken or the ordinance is void. This, without distinction between an ordinance void on its face and one whose invalidity is not so apparent. Annexation ordinances, none of which was void on its face, were held void in *City of Corsicana* v. *Willmann*, 147 Tex. 377, 216 S.W. 2d 175; *State ex rel Osborn* v. *City of McAllen*, 127 Tex. 63, 91 S.W. 2d 688; and *City of River Oaks* v. *Lake-*

worth Village, 231 S.W. 2d 768 (Tex. Civ. App. 1950, error ref. n.r.e.).[9]

Ordinances on other subjects not adopted in accordance with charter or statutory provisions uniformly have been held void. *Zachry* v. *City of San Antonio*, ... Tex. ....., 305 S.W. 2d 558 (1957); *City of San Antonio* v. *Micklejohn*, 89 Tex. 79, 33 S.W. 735 (1895); *State ex rel Rea* v. *Etheridge*, 32 S.W. 2d 828 (Tex. Com. App. 1930); *Castleberry* v. *Coffee*, 272 S.W. 767 (Tex. Com. App. 1925); *City of Centerville* v. *Adkisson*, 291 S.W. 2d 798 (Tex. Civ. App. 1956); *Kerr* v. *Shambaugh*, 86 S.W. 2d 798 (Tex. Civ. App. 1935); and *Mills* v. *City of San Antonio*, 65 S.W. 1121 (Tex. Civ. App., err. ref. 1901); *Peters* v. *Gough*, 85 S.W. 2d 515 (Tex. Civ. App. 1935).

The effect on the State by an annexation by a void ordinance is the same whether the invalidity is apparent by reading the ordinance or the minutes of the proceedings of its adoption. The invalidity of an ordinance having a defective title is apparent on the face of the ordinance. The invalidity of an ordinance not published in accordance with charter provisions is not apparent on its face but it is just as void, and there is no reason or basis for denying judicial remedy to attack the latter and affording a remedy to attack the former.

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[9] While the notation "Refused. No Reversible Error" ordinarily does not indicate approval of a holding of a Court of Civil Appeals by the Supreme Court, since only one holding was involved in the *River Oaks case*, the refusal of the Supreme Court to entertain the writ of error approved that holding. *McLendon* v. *City of Houston, et al*, 153 Tex. 318, 267, S.W. 2d 805, 806 (1954); *State* v. *Texas City*, ... Tex. ....., 303 S.W. 2d 780, 782 (1957).

CONCLUSION

Petitioners' persons and property have been subjected to the general municipal jurisdiction of the City of Houston and their property has been subjected to taxation by the City of Houston by an ordinance annexing additional territory to the City and by judgment of the court below Petitioners have been denied a judicial remedy unless the ordinance is void on its face or a State's attorney can be pursuaded to perform the formality of signing a petition for an information in the nature of *quo warranto*. Perhaps the State of Texas is not required to provide judicial remedies to citizens to attack an annexation ordinance, but when such remedy is provided it must be afforded equally to all citizens similarly situated and not subject to the arbitrary discretion of an administrative official. Two hypothetical cases illustrate the importance of the questions.

(1) The property of Farmer Brown on the south side of U.S. Highway 90, near the City of Houston, and the property of Farmer Green across the highway are annexed by separate identical ordinances, neither of which was published as required by the Charter of the City of Houston. The Attorney General does not believe that the State has an interest in challenging either ordinance, but as a favor files *quo warranto*, on the relation of Farmer Brown, attacking the ordinance, and refuses a similar request from Farmer Green.

(2) The farm of Farmer Smith on the west side of U.S. Highway 75, near Houston, is annexed by an ordinance having a defective caption. He may bring suit, without the consent of a State's attorney because the ordinance is void on its face. The property of Farmer Jones, across the highway on U.S. Highway 75, is annexed by an ordinance which was not published as required by the charter. This

ordinance is equally void, but Jones is without remedy unless he can persuade a State's attorney to perform the formality of filing *quo warranto*.

The farmers of the Brown and Green families are numerous in Texas and the questions here are important to them. More important though is the need for affirmation of the guarantee of access to courts to all persons equally — a question not directly discussed by this Court since *Truax* v. *Corrigan*.

Wherefore, Petitioners respectfully pray that a writ of certiorari issue to the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

Respectfully submitted,

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APPENDIX A

OPINION AND JUDGMENT BELOW

Opinion of Court of Civil Appeals

BELL, Justice.

This case involves an attack upon annexation ordinance No. 3351 passed by the City Council of the City of Houston on December 31, 1956. Under the terms of the ordinance rather extensive territory lying adjacent to the city was added to the corporate limits of Houston.

Appellants, who were the plaintiffs in the trial court, by their First Amended Original Petition, asserted two causes of action. The plaintiffs in the causes of action are different.

In the first cause of action some one hundred individual citizens of the territory annexed sued the City of Houston seeking a declaratory judgment that the ordinance was void, and seeking an injunction to prevent assessment and collection of ad valorem taxes. They sued in their individual capacities and as representatives of the other residents of the territory annexed.

In the second cause of action certain citizens of the City of Houston, as tax payers, sued the City of Houston and its controller seeking to enjoin payment of any debts or claims of any Fresh Water Supply District or Water Control and Improvement District situated within the annexed territory.

Neither the County Attorney of Harris County, nor the Attorney General of Texas, joined in either of the causes of action.

The appellees, in their answer to the appellants' first cause of action, filed special exceptions, a general denial and special answers. The special answers stated that the ordi-

nance can only be attacked by a direct suit in the nature of a quo warranto proceeding as the complaints of appellants at most set up mere irregularities in the passage of the ordinance.

Appellees' answer to the second cause of action is substantially the same as to the first cause of action with the added special answer that under Article 1182c-1 of the Laws of Texas, 1925, Vernon's Ann. Civ. St., authority is given the city to assume the indebtedness of Fresh Water Supply Districts and Water Control and Improvement Districts.

Both appellants and appellees filed motions for summary judgment. The trial court denied appellants' motion and granted that of appellees.

Appellants contend the action of the trial court was erroneous because under the undisputed facts the ordinance was void and in this situation a private citizen may maintain the suit without joinder by the State of Texas.

The City Council annexed the territory under authority of Article I, Section 2b of the City Charter, which reads as follows:

> "Sec. 2b. Extending Limits by Action of City Council — The City Council shall have power by ordinance to fix the boundary limits of the said City of Houston and to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city with or without the consent of the territory and inhabitants annexed; that upon the introduction of such an ordinance in the Council after it has been reported upon by the Ordinance Committee and has been amended as desired by the Council for final passage it shall be published in some daily newspaper published in the City of Houston one time, and shall not thereafter be finally passed until at least 30 days has elapsed after said publication, and when said ordinance is finally passed the said territory so annexed shall be a part of the City of Houston, and the inhabi-

tants thereof shall be entitled to all the rights and privileges of other citizens, and shall be bound by the acts, ordinances, resolutions and regulations of the said city." (Added by amendment, 1913.)

Appellants contend that all provisions of this Article are mandatory and since the City Council did not comply with them the ordinance is void. They say the Council failed to comply with the provisions in the following respects:

1. The Ordinance Committee did not hold a meeting before or after the ordinance was introduced in the City Council.

2. The Committee gave no notice of the time and place of a meeting.

3. No opportunity was given citizens to be heard on the ordinance by the Committee.

4. The Committee did not report on the ordinance after it was introduced.

5. The City Council arbitrarily denied appellants and other citizens the opportunity to be heard at any council meeting, as required by Section 3, Article III of the Charter.

6. The ordinance was not amended as desired by the Council for final passage before it was published in a newspaper, as required by Section 2b, Article I.

7. The ordinance was amended at the Council meeting of November 28, and since there had been publication of the ordinance before the amendment this made it a new ordinance which had been read only once and therefore the publication on November 29 of the ordinance as amended was not a compliance with the Charter.

These represent the complaints concerning alleged failure to comply with the charter provisions.

However, appellants also contend that Article I, Sec. 2b of the Charter is void as being in conflict with Article 1265, Revised Civil Statutes of Texas, Vernon's Ann. Civ. St. Art. 1265, and therefore the city is without authority to annex territory without a vote of the persons in the city.

We will first determine the validity of Article I, Sec. 2b, of the Charter, which confers power of annexation, without a vote of the people, upon the City of Houston.

Article I, Sec. 2b, was adopted as an amendment to the Charter in 1913. This was done pursuant to the authority conferred by Article XI, Sec. 5, Constitution of Texas, Vernon's Ann. St. This constitutional provision confers authority upon cities with a population of more than 5,000 inhabitants to adopt charters so long as a provision of the charter is not inconsistent with some provision of the Constitution, or the general laws of the State of Texas. At the time of the adoption of Sec. 2b, Article I, of the Charter, it was valid since it was not inconsistent with the Constitution of Texas or any general law. It therefore effectively conferred power upon the City Council of the City of Houston to annex territory adjacent to the city by passing an ordinance. Thereafter the Legislature of Texas passed an Act which became Article 1265 of the Revised Civil Statutes of 1925. Under this article cities with a population of between 100,000 and 150,000 could annex territory only after a vote of the people of the city. This was held to be applicable to Houston in *Hunt* v. *Atkinson*, Tex. Comm. App., 12 S.W. 2d 142. There an annexation ordinance passed without a vote of the people while Houston was within this population bracket was held void. However, the City of Houston, under the federal census of 1930, had a population far in excess of 150,000 inhabitants, and Article 1265 was no longer applicable to Houston. The passage of Article 1265 did not render Sec. 2b, Article I, void. It merely suspended its

operation so long as Houston remained in the prescribed population bracket. The charter provision was valid when passed and while its effectiveness was suspended so long as an inconsistent general law existed; when the inconsistency was removed by Houston passing out of the class of cities covered by Art. 1265, Sec. 2b, Article I, again became operative. 39 Tex. Jur., Sec. 72, p. 136; 50 Amer. Jur., Sec. 581; *Texas & P. Ry. Co.* v. *Graham*, Tex. Civ. App., 257 S.W. 642 (error dism.); *Texas & N. O. Ry. Co.* v. *Yerkes*, Tex. Civ. App., 156 S. W. 579 (error ref.); *Houston & T. C. R. Co.* v. *Bright*, Tex. Civ. App., 156 S.W. 304 (error ref.); *Reid* v. *State of Colorado*, 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108; *In re Rahrer*, 140 U.S. 545, 11 S. Ct. 865, 35 L. Ed. 572; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 17 U.S. 122, 4 L. Ed. 529.

Sec. 2b, Article I, of the Charter, being valid and operative, the City of Houston had power by ordinance to annex the territory described in Ordinance No. 3351.

The city, having power to annex the territory by ordinance, without the consent of the inhabitants of the territory annexed, the ordinance may be collaterally attacked only if the ordinance is void on its face. 30A Tex. Jur., Municipal Corporations, Sec. 99, pp. 111-113; *Tod* v. *City of Houston*, Tex. Com. App., 276 S.W. 419; *Beyer* v. *Templeton*, 147 Tex. 94, 212 S.W. 2d 134; *Lefler* v. *City of Dallas*, Tex. Civ. App., 177 S.W. 2d 231; *Phillips* v. *City of Odessa*, Tex. Civ. App., 287 S.W. 2d 518 (error ref., n.r.e.).

In *Lefler* v. *City of Dallas*, the Court said:

> "The attack here made upon appellee's ordinance is a collateral one, not being in nature of quo warranto or to which the state is a party. * * * Appellants recognize this by assuming the burden of establishing utter invalidity of the ordinance on its face; * * *. Appellants' objections to the measure in general are based upon an

> alleged failure to comply with the law governing annexation; and in this connection, distinction should be drawn between municipal acts unauthorized by law or color of law, and those consisting of a mere irregular exercise of power. Appellants, to maintain a collateral attack, must show an entire want of power on the part of the City to annex * * *, and it is not sufficient to allege a mere irregular exercise thereof. * * * Appellants' contentions, therefore, that the territory is not sufficiently described by metes and bounds; nonjoinder of the area to the City; and that complainants were not afforded a hearing before the Council, are obvious attacks on the *regularity* of the annexation proceedings * * *." [Tex. Civ. App., 177 S.W. 2d 233.]

The fact that appellants ask for a declaratory judgment does not change the character of the attack. The Declaratory Judgment Act does not enlarge or create new jurisdiction for the courts. *Phillips* v. *City of Odessa*, *supra*.

This suit being a collateral attack, it is necessary that appellants show the ordinance to be void upon its face. The allegations in appellants' First Amended Original Petition setting up the absence of notice of hearings before the Ordinance Committee and City Council, the denial of a right to be heard, the amendment of the ordinance, failure of the Ordinance Committee to hold a meeting and report after the ordinance was introduced, and the failure to hear appellants, are matters that may be asserted only in a direct attack by the State, or its representatives, in a proceeding in the nature of quo warranto.

Appellants contend the caption to the ordinance is insufficient. The caption reads as follows:

> Ordinance No. 3351
>
> "An Ordinance Extending the City Limits of the City of Houston to Include All Lands and Area Within

Certain Limits and Boundaries With Certain Exceptions, and Annexing to the City of Houston All of the Area Within Said Limits and Boundaries With Certain Exceptions; Further Extending the City Limits of the City of Houston By Adding Certain Other Additional Territory Thereto, To-Wit: the Area or Areas Comprising (A) the City's San Jacinto Reservoir (Known as Lake Houston), (B) the City's San Jacinto River Dam and Appurtenant Lands; and (C) the City's New West Water Canal and the Right-of-Way Therefor; Providing That Such Ordinance Shall Not Affect the Jurisdiction of the City of Houston Over Certain Territory Which Was Acquired by Virtue of an Ordinance Passed April 18, 1913; Providing a Saving Clause; and Providing That the Inhabitants of the Territory Hereby Annexed Shall be Entitled to the Rights and Privileges of Other Citizens of the City of Houston and Shall be Bound by the Acts, Ordinances, Etc., of Said City."

The assertion is that the caption does not clearly express the subject of the ordinance as required by the City Charter, Sec. 3, Article VII, but to the contrary conceals the subject by expressly mentioning a specific description of only a small portion of the lands annexed. Too, they say more than one subject is expressed in the caption.

The caption first states that this is an ordinance "extending the City limits * * * to include all lands and area within certain limits * * * annexing to the City of Houston all of the area within said limits and boundaries with certain exceptions; * * *."

The first part of the caption gives notice that the subject matter of the ordinance is annexation of territory and the territory is such as is described.

The caption continues: "* * * further extending the City limits * * * by adding certain other additional territory * * *."

The use of the terms "further" and "other additional" gives notice that in addition to the lands covered in the first part of the caption the ordinance will also cover the area around Lake Houston.

We find no concealment in the language used.

We think the caption relates to only one subject, that is, the annexing of additional lands to the City of Houston. The caption is sufficient if there is one general object and all of the subjects are germane to such object and reasonably appropriate to effect the general object of the ordinance. *Magnolia Petroleum Co.* v. *Beck*, Tex. Civ. App., 41 S.W. 2d 488, error dism.; *City of Beaumont* v. *Gulf States Utilities Co.*, Tex. Civ. App., 163 S.W. 2d 426, error refused, w.o.m.

Appellants next assert that the description of the area annexed is insufficient. The basis of this contention seems to be that the ordinance as introduced on October 31, 1956, described extensive territory to be annexed and then excepted such "City, Town or Village other than the City of Houston" as was within the described area. They say this has the effect of excluding such other city, town or village which existed in the area at the introduction date of the ordinance and no one could know what cities, towns or villages might be incorporated before final passage of the ordinance.

Appellants make no contention that there was any effort by any group within the area to incorporate between the date the ordinance was introduced and the date of final passage. Even had such occurred, however, the efforts would have been ineffective because the law is settled that in an annexation proceeding the city exercises jurisdiction over the described area on the first reading of the ordinance and any attempt by persons living within the area to incorporate between the first reading and final passage of the

ordinance is ineffectual. *Beyer* v. *Templeton*, 147 Tex. 94, 212 S.W. 2d 134; *State ex rel. Winn* v. *City of San Antonio*, Tex. Civ. App., 259 S.W. 2d 248, error ref., n.r.e.

It follows that when the ordinance was introduced it could be ascertained what, if any, cities, towns or villages were then within the area, and what their corporate limits were and only those cities, towns and villages were, or need be, excepted.

Appellants further contend that the City Council lacked power to annex the territory by ordinance because in 1949 an ordinance extending the limits of the City of Houston was passed by a vote of the people. Article VIIb, Sec. 9, of the Charter, provides that an ordinance adopted by a vote of the people may be amended by council only in response to a referendum petition or a vote of the people. Ordinance 3351 is not and does not purport to be an amending ordinance. It leaves unaffected the territory covered by the 1949 ordinance. The 1949 ordinance remains fully effective. Ordinance 3351 covers an entirely distinct area.

Appellants, who were plaintiffs in the second cause of action, asserted in Plaintiffs' First Amended Original Petition, are tax payers of the City of Houston, and their claim in this cause of action is that they are authorized by Section 1 of Article IX of the Charter to maintain the suit to enjoin the payment of the debts and claims of any Water Control or Improvement District or any Fresh Water Supply District because such debts and claims are illegal since the annexation ordinance is void for the reasons hereinbefore discussed.

This is also but a collateral attack on the annexation ordinance which, as hereinbefore stated, can be maintained only in a suit brought by the State or its duly authorized

representatives, and the ordinance is not subject to the other complaints urged by appellants, as we have held.

Further, however, appellants contend that even if the annexation ordinance is valid, or cannot be collaterally attacked and therefore, the territory is a part of the City of Houston, they may maintain this attack under Sec. 1, Article IX of the Charter because the city cannot legally pay the debts or claims of such districts.

The pertinent parts of said charter provision read as follows: "Any citizen who is a property taxpayer of the City of Houston may maintain an action in the proper court to restrain the execution of any illegal, unauthorized or fraudulent contract or agreement * * *, and to restrain any disbursing officer of said city from paying any illegal, unauthorized or fraudulent bills, claims or demands against said city, * * *." They say the debts and claims of these districts are illegal because there is no authority in the city to assume them since Article 1182c-1, Vernon's Revised Civil Statutes of Texas, under which the city purports to act is invalid. The claim of invalidity is based on the following:

1. It conflicts with Article 7880-147zl, Vernon's Annotated Civil Statutes, which article is later in point of time and, therefore, controls and the latter requires a vote of the people.

2. It is a special law within the meaning of Article III, Sec. 56 of the Constitution.

3. It violates Sec. 35, Article III of the Constitution in that its title is misleading.

4. It is unconstitutional because it requires no vote of taxpaying property owners, as required by Article VI, Sections 3 and 3a, and Article XVI, Section 59, of the Constitution..

In their first amended original petition appellants made no contention that Article 1182c-1 was invalid as being repealed by Article 7880-147zl, V.A.C.S., or that the article was invalid because of a misleading title. We will therefore, take no further notice of these two complaints.

Article 1182c-1 is not invalid as violative of Article III, Section 56 of the Constitution, which prohibits the passage of a special law by the legislature.

The basis of the contention that this is a special law is that the title to the original act was too restrictive and the classification bore no reasonable relation to the object of the legislation. It is unnecessary for us to pass on this question because the 51st Legislature amended Sections 1 and 2 of the Act. Acts 51st Legislature 1949, Chapter 206, p. 387. Appellants do not attack the title to the amendatory act. They merely say since only Sections 1 and 2 were amended, this could not revive the whole act which was unconstitutional.

In Texas the legislature may amend an unconstitutional act and make it valid. *Ex parte Housley*, Tex. Cr. App., 285 S.W. 2d 720; *English and Scottish-American Mortgage and Investment Company, Limited* v. *Hardy*, 93 Texas 289, 55 S.W. 169.

Sections 1 and 2 which were amended, without more, require the city to assume all debts and liabilities of the districts and abolish the districts. The city, therefore, is but paying an obligation fixed on it by the legislature. Article IX, Sec. 1, of the Charter authorizing suits by taxpayers to enjoin payment of illegal, fraudulent or unauthorized claims, applies only to such as are created by the city in carrying out its municipal functions and not to obligations imposed by statute. *Wheeler* v. *City of Brownsville*, 148 Tex. 61, 220 S.W. 2d 457.

Article 1182c-1 does not violate Sections 3 and 3a of Article VI of the Constitution. These sections do not require a vote by the people on the question of assuming an indebtedness. They merely prescribe the qualifications of voters, where the matter of assuming or creating indebtedness is submitted to the people.

The article does not violate Section 59, Article XVI, or Section 52, Article III, of the Constitution. *Dallas County Water Control and Improvement District No. 3* v. *City of Dallas*, 149 Tex. 362, 233 S.W. 2d 291. *Wheeler* v. *City of Brownsville*, *supra*.

Appellants urge that in any event ordinance No. 3351 was not effective until it was published as an adopted ordinance on January 4, 1957. Article IX, Section 17b of the Charter provides for the publication of the title or caption of an ordinance within ten days after passage and approval. The same section provides an ordinance "shall take effect and be in full force and effect from and after its passage and approval * * * provided all such * * * ordinances shall be subject to the provisions * * * for referendum." Article VIIb, Section 3, provides for a referendum petition to suspend an ordinance if such be filed before such ordinance shall take effect or within thirty days after publication. No contention is made that the ordinance was in fact thus suspended. Under the facts and the Charter provisions the ordinance became effective December 31, 1956.

The judgment of the trial court is affirmed.

WOODRUFF, J., not sitting.

Judgment of Court of Civil Appeals

This cause, being an appeal from the judgment rendered and entered by the court below on March 25, 1957, came on

to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, Associate Justice Woodruff not sitting, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellants, E. E. Forbes, [names of 198 Appellants omitted] jointly and severally, and their surety, Fidelity and Deposit Co. of Maryland, pay all costs incurred by reason of this appeal and all such trial court costs as were therein adjudged against the said appellants. It is further ordered that this decision be certified below for observance.

APPENDIX B

STATUTES, CHARTER PROVISIONS AND ORDINANCES

Statute: Tex. Civ. Stat. (Vernon 1948) Art. 6253

If any person shall usurp, intrude into or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes, any office or franchise, or any office in any corporation created by the authority of this State, or any public officer shall have done or suffered any act which by law works a forfeiture of his office, or any association of persons shall act within this State as a corporation without being legally incorporated, or any corporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as such, or exercises power not conferred by law; or if any railroad company doing business in this State shall charge an extortionate rate for the transportation of any freight or passengers, or refuse to draw or carry the cars of any other railroad company over its lines as required by the laws of this State, the Attorney General, or district or county attorney of the proper county or district, either of his own accord or at the instance of any individual relator, may present a petition to the district

court of the proper county, or any judge thereof in vacation, for leave to file an information in the nature of a quo warranto in the name of the State of Texas. If such court or judge is satisfied that there is probable ground for the proceeding, he shall grant such leave and order the information to be filed and process to issue.

CHARTER OF CITY OF HOUSTON:

Art. I, Sec. 2b

The City Council shall have power by ordinance to fix the boundary limits of the said City of Houston and to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city with or without the consent of the territory and inhabitants annexed; that upon the introduction of such an ordinance in the Council after it has been reported upon by the Ordinance Committee and has been amended as desired by the Council for final passage it shall be published in some daily newspaper published in the City of Houston one time, and shall not thereafter be finally passed until at least 30 days has elapsed after said publication, and when said ordinance is finally passed the said territory so annexed shall be a part of the City of Houston, and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens, and shall be bound by the acts, ordinances, resolutions and regulations of the said city.

Art. VII, Sec. 3 (Second Paragraph)

All meetings of the Council and of all committees thereof shall be open to the public and the rules of the Council shall provide that citizens of the city shall have a reasonable opportunity to be heard at any such meetings in regard to any matter to be considered, provided that the Council may

enact ordinances requiring applications for hearings to be in writing and shall have power to prescribe rules and regulations for such hearings.

ORDINANCES OF THE CITY OF HOUSTON

Ordinance No. 3351

[Title of ordinance omitted]

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON:

SECTION 1: That the boundaries and limits of the City of Houston are hereby extended so as to embrace and include all of the lands and area lying within the following described boundaries and comprised within the following limits (save and except only such of the land lying within such boundaries and limits as is described in the exceptions set forth or stated in Section 2 of this ordinance), to-wit:

[Field notes or area annexed omitted]

SECTION 2: All of the area which is not now within the limits of the City of Houston, but which is comprised within the boundaries or limits hereinabove set forth is hereby annexed to and made a part of the City of Houston, save and except:—

[Description of excepted areas omitted]

SECTION 3: That the boundaries and limits of the City of Houston are also hereby extended so as to embrace and include the following described areas of land, and the following described areas of land are hereby also annexed and made a part of the City of Houston, to-wit,—

[Description of areas omitted]

[Sections 4, 5 and 6 omitted]

SECTION 7: That from and after the passage of this ordinance, the inhabitants of the territory hereby annexed shall be entitled to all the rights and privileges of other citizens of the City of Houston and shall be bound by the acts, ordinances, resolutions and regulations of the said City of Houston.

SECTION 8: The City Secretary is hereby authorized to publish this ordinance one time in some daily newspaper published in the City of Houston, Texas, and this ordinance shall not finally be passed until at least thirty days have elapsed after such publication.

Passed first reading the 31st day of October, 1956.

Passed second reading as amended the 21st day of November, 1956.

Passed third reading as further amended this 28th day of November, 1956.

Passed fourth and final reading this 31st day of December, 1956.

Passed this 31st day of December, 1956.

Approved this 31st day of December, 1956.

/s/ O. F. HOLCOMBE
Mayor of the City of Houston